Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

81-151

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

JOE L. FINE and WALTER F. JOHNSEY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

L. DREW REDDEN
Redden, Mills & Clark
940 First Alabama Bank Building
Birmingham, Alabama 35203
(205) 322-0457

F. TIMOTHY MCABEE
Sirote, Permutt, Friend,
Friedman, Held & Apolinsky, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35255
(205) 933-7111
Counsel for Walter F. Johnsey, Petitioner

PHILLIP A. WITTMAN
STEPHEN H. KUPPERMAN
Stone, Pigman, Walther, Wittmann
& Hutchinson, P.A.
1000 Whitney Bank Building
New Orleans, Louisiana 70130
(504) 581-3200
Counsel for Joseph L. Fine, Petitioner

QUESTIONS PRESENTED

1. Is the prosecutor entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial will necessarily result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction?

2. Is the "clearly erroneous" standard appropriate for review of a district court's findings with respect to an alleged violation of the Double Jeopardy Clause?

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

The Constitutional Provision Involved 3

Statement of the Case 3

Basis for Federal Jurisdiction in the Trial Court 8

Reasons for Granting the Writ 9

Argument 10

I. The Prosecution's Deliberate Joinder of Wholly-Unrelated Offenses and Defendants in Order to Improve the Chances of Conviction Constitutes Prosecutorial Over-Reaching Which Bars Reprosecution 10

II. The Fifth Circuit Erred in Applying an Improper Standard of Review 15

Conclusion 16

Proof of Service 19

TABLE OF CASES

Page

Baker v. Metcalfe,
633 F.2d 1198, 1201 (5th Cir. 1981) 15

Berger v. United States,
295 U.S. 78, 88 (1935) 16

United States v. Joe L. Fine and Walter F. Johnsey,
No. 80-7987 (5th Cir. April 27, 1981) 2

United States v. Dinitz,
424 U.S. 600 (1976) 10, 11

United States v. Jorn,
400 U.S. 470, 481 (1981) 10, 11

United States v. Kessler,
530 F.2d 1246, 1255-1256 (5th Cir. 1976) 13

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend V 3, 10

18 U.S.C. § 1341 ..... 3, 5, 9

18 U.S.C. § 1343 ..... 3, 4, 9

18 U.S.C. § 1951 (a) 3, 4, 9

18 U.S.C. § 1961 et seq. 3, 8

18 U.S.C. § 1962 (d) 3

28 U.S.C. § 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

JOE L. FINE and WALTER F. JOHNSEY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of *Certiorari* issue to review the final order of the United States Court of Appeals, Fifth Circuit, No. 80-7987, entered on April 27, 1981, which affirmed the judgment of the district court of the Northern District of Alabama denying Petitioners' motion to dismiss Counts Fourteen through Nineteen on Double Jeopardy grounds in the following entitled case:

UNITED STATES OF AMERICA,	)	Plaintiff-Appellee
v.	)	
JOE L. FINE and WALTER F. JOHNSEY,	)	Defendants-Appellants

NO. 80-7981

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division.

In addition, Petitioners respectfully pray a Writ of *Certeriorari* issue to review the final order of the United

States Court of Appeals, Fifth Circuit, on, to-wit, May 26, 1981, which overruled and denied Petitioners Petition for Rehearing, or in the Alternative Rehearing *En Banc*.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is reported in *United States vs. Joe L. Fine and Walter F. Johnsey*, No. 80-7987 (5th Cir. April 27, 1981). The opinion sought to be reviewed is also contained in the Appendix at pg. A-1. The order overruling and denying the Petition for Rehearing, or in the Alternative Rehearing *En Banc*, was entered on May 26, 1981, and is set forth in the Appendix at pg. A-10. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, affirming the district court's judgment in this case was entered on April 27, 1981. Petitioners' Petition for Rehearing, or in the Alternative Rehearing *En Banc* was denied on, to-wit, May 26, 1981. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within sixty days of the Fifth Circuit's order denying a rehearing.

QUESTIONS PRESENTED

1. Is the prosecutor entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial will necessarily result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction?

2. Is the "clearly erroneous" standard appropriate for review of a district court's findings with respect to an alleged violation of the Double Jeopardy Clause?

THE CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Fifth Amendment to the United States Constitution is set forth below:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

On October 30, 1979, after a grand jury investigation lasting eighteen months, Walter F. Johnsey and Joseph L. Fine were indicted with six other defendants[1] in the United States District Court for the Northern District of Alabama in a thirty-two page, nineteen count indictment alleging, *inter alia,* violations of the "Racketeer Influenced and Corrupt Organizations Act," 18 U.S.C. § 1961 *et. seq.* (hereinafter "RICO"), the Hobbs Act, 18 U.S.C. § 1951 (a), the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343. R. 1-32. All defendants were charged in Count One of the indictment with conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity (i.e., mail fraud, bribery, wire fraud and extortion) in violation of 18 U.S.C. § 1962

---

[1]The defendants named in the indictment are The Drummond Company, a large coal producer; Garry Neal Drummond, Elbert A. (Larry) Drummond and Clyde Clifton (Sappo) Black, all identified as officers of The Drummond Company; Walter F. Johnsey, a former executive vice president and chief financial officer of the Alabama Power Company; Joseph L. Fine and Eddie Hubert Gilmore, both former members of the Alabama Senate; and Jack Biddle, III, a member of the Alabama House of Representatives.

(d).[2] R. 1-18. Counts Two through Twelve charged only Garry Neal Drummond, Elbert A. (Larry) Drummond, and Clyde Clifton (Sappo) Black with mail fraud in a series of transactions with one George Jones. R. 19-25. Count Thirteen charged Mr. Johnsey, Garry Neal Drummond and Elbert A. (Larry) Drummond with the interstate transmission of communications by wire for the purpose of executing a scheme or artifice to defraud First Virginia Mortgage & Real Estate Investment Company of money or property in violation of 18 U.S.C. § 1343. R. 25-28. Count Fourteen charged Mr. Fine, alone, with using his position as a state senator to extort money from one Gerald Ingle in violation of 18 U.S.C. § 1951(a). R. 28. Counts Fifteen through Nineteen charged Mr. Johnsey and Mr. Fine, alone, with use of the United States mails for the purpose of executing a scheme or artifice to defraud the Alabama Power Company and its stockholders of Mr. Johnsey's loyal and faithful services, and for the purpose of executing a

---

[2]Count One alleged that all defendants conspired to conduct the affairs of an "enterprise", consisting of all eight defendants, through a pattern of racketeering activity. R. 3. All of the transactions which form the basis of Counts Two through Nineteen of the indictment were set out in Count One as predicate acts of racketeering. In addition, Count One also charged Garry Neal Drummond, Elbert A. (Larry) Drummond, Clyde Clifton (Sappo) Black and Walter F. Johnsey with using the financial resources of The Drummond Company to bribe Joseph L. Fine, Eddie Hubert Gilmore and Jack Biddle, III, as well as other members of the Alabama legislature by the giving or promising of gifts and gratuities to such individuals, including providing prostitutes (to legislators other than the named defendants), trips and other items of value. In addition, Count One contained allegations concerning the dealings of Mr. Fine with Real Coal Sales, Inc., a coal mining company. Count One also charged The Drummond Company and Mr. Gilmore with wrongdoing in connection with loan guarantees made by the corporation for Mr. Gilmore, who operated a coal hauling business. Finally, Count One charged Garry Neal Drummond, Elbert A. (Larry) Drummond and Jack Biddle, III with wrongdoing in connection with coal royalty payments made by The Drummond Company to Mr. Biddle. The Drummond Company, Mr. Gilmore and Mr. Biddle were charged only in Count One. R. 4.

scheme or artifice to defraud the citizens of the State of Alabama of their right to have the business and affairs of the Alabama Senate conducted free from corruption and fraud, all in violation of 18 U.S.C. § 1341. R. 28-32.

All eight defendants were separately represented by counsel. Each defendant attacked the legal sufficiency of the indictment, particularly Count One, by a strenuous motion to dismiss. R. 107, 1550-1558, 1674-1680, 1995-1998, 2062-2064, 2141-2146. In addition, each defendant, including Mr. Johnsey and Mr. Fine, filed motions for severance. R. 213-214, 1562-1556. The prosecution vigorously resisted these motions.[3]

---

[3]At the hearing on defendants' motions to dismiss and motions for severance, defense counsel clearly called to the attention of the court and the prosecution the fact that the instant case could not be tried as a unit, but for Count One:

> We say that Count one is due to be dismissed, and we say that as a consequence of that, the Court is to examine and to grant in the manner in which the Court feels there should be granted various motions for severance and separate counts of indictment because if Count one fails, then there is no justification in the world for putting the defendants to the unfairness of a trial together of the remaining various counts. We submit, even if Count one did not fail, that motions for severance were due to be granted, but that it would be compulsory in the event that the motions to dismiss Count one are sustained.

Tr. 21-22, April 4, 1980.

The prosecution responded:

> A complaint has been logged by Mr. Redden – I will just speak of this briefly because I think Mr. Segrest is going to address that more specifically, that it is unfair that Walter Johnsey is going to be tried with all these other persons and that some of the evidence against them may spill over and may taint him. Your Honor, we remind the Court that in *Elliott*, [*United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom, Delph v. United States*, 439 U.S. 953 (1979)] there were numerous acts of racketeering charged in furtherance of that enterprise, including murder, and the Fifth Circuit noted that it is unfortunate that one who has nothing to do with a murder is tried with others who have. But when you join the enterprise and participate in its affairs through a pattern of racketeering activity,

Trial of the entire indictment, including all eight defendants, commenced before the Honorable Frank H. McFadden, Jr., Chief Judge, United States District Court for the Northern District of Alabama, on May 5, 1980. On the morning of July 7, 1980, more than two months into the trial, defense counsel again[4] raised at length with the Court the total lack of proof of the conspiracy and the enterprise. Tr. 12,313-12,328. In response to defense counsel's arguments, the Court declared that the time had arrived to decide whether there was an enterprise or a conspiracy. Tr. 12,343-12,345. On the following day, the government proffered its evidence on the remaining allegations of the indictment. Tr. 12,381-12,390. The trial court ultimately held that the government had failed in its proof as to all defendants on Count One and ruled that Count One was due to be dismissed as to all defendants. Tr. 12,528. With respect to the government's failure of proof on Count One, the Court stated:

> The Court is of the opinion that the defendants have been subjected to unnecessary expense and burden by the indictment. Because while the Court took considerable time to deliberate on the matter, there was not any doubt about it once the Court had reviewed it. *And the evidence did not just fail, but it failed in a very significant and almost startling way in many aspects of it.* Tr. 12,802. (Emphasis supplied).[5]

---

that is just such a risk that you take, and that is the risk that is prohibited by the Congress in the RICO statute.

Tr. 47, April 4, 1980.

[4]Defense counsel and the district court raised the issue of proof of the existence of the enterprise and of the conspiracy on numerous occasions throughout the course of the trial. Tr. 3865-3879; 4682-4683; 7169-7170; 8996-9005; 9024-9025; 10122-10123; 11680-11683.

[5]The prosecutors' excuse for subjecting these defendants to embarrassment, expense, and ongoing anxiety and insecurity prior to such abysmal failure is equally "startling." They do not suggest the death or absence of key witnesses, the sudden recantation of grand jury testimony, or

With the dismissal of Count One, the government's case against those defendants named only in Count One, The Drummond Company, Mr. Gilmore and Mr. Biddle, was concluded.

Following dismissal of Count One, the remaining defendants, including Mr. Johnsey and Mr. Fine, filed motions for acquittal or dismissal or, alternatively, for mistrial of the remaining counts. Tr. 12,543, 12,530-12,531; R. 840-892, 901-916, 928-939. Mr. Johnsey and Mr. Fine argued, *inter alia*, that acquittal on Counts Fourteen through Nineteen was required in the interest of justice.[6] Tr. 12,729-12,731, 12,753-12,755.

---

surprise of any type in the course of trial. They simply blame it on the grand jury for returning the indictment. *E.g.*, Tr. 12,756-12,757. The Fifth Circuit dismissed the Government's contention, stating:

> The prosecutors' implication of complete divorcement from the indictment, and of a duty to enforce every indictment however unfounded, is at best inappropriate. Opinion, Appendix at pg. A-5, n. 5.

[6]The prosecution contended that mistrial and severance as opposed to acquittal in the interest of justice, was the fairest alternative. In this regard the Court asked:

> THE COURT: Well they have been put to a good deal of trouble, and the rulings of the Court turned out to be pointless, have they not?
>
> MR. HENRY: In connection with Count One, yes, sir. The trial has been long.
>
> THE COURT: And they tried their best to get it severed, and they tried their best to get it dismissed and the Court overruled it. I guess the question is how long can the prosecution keep putting them through trials?
>
> MR. HENRY: Well if it please the Court, we're not retrying them on matters which have already been presented to the Court.
>
> THE COURT: He says he and other defendants have been subjected to a whole lot of real punishment by having to stand trial on charges that turned out to be without substance and that the Court ought to exercise its general powers of supervision and say that's enough. That's what I hear them saying.
>
> Now, they have been put through a great deal without justification, have they not?
>
> MR. HENRY: Well, if it please the Court, justification was a grand jury indictment – indictment returned by the grand jury in this Court

On July 15, 1980, the district court ruled that the government had failed to adduce evidence sufficient to go to the jury on Counts Two through Twelve, and granted the motions of Garry Neal Drummond, Elbert A. (Larry) Drummond and Clyde Clifton (Sappo) Black for judgments of acquittal on those counts. Tr. 12,794-12,795. On the same date, the district court granted the motions of Garry Neal Drummond, Elbert A. (Larry) Drummond, and Mr. Johnsey for judgments of acquittal on Count Thirteen. Tr. 12,799. Concluding that no evidence had been adduced on Counts Fourteen through Nineteen, the district court declined to grant judgments of acquittal on those counts. A mistrial as to Counts Fourteen through Nineteen, as well as a severance of Count Fourteen from Counts Fifteen through Nineteen for retrial, however, were ordered by the district court. Tr. 1032-1051.

On November 6, 1980, Mr. Fine submitted a motion to dismiss Counts Fourteen through Nineteen on Double Jeopardy grounds. Mr. Johnsey, thereafter, filed a separate motion seeking dismissal of Counts Fifteen through Nineteen on identical grounds. R. 1503-1509. The district court conducted a hearing on November 24, 1980, during which it orally denied the motions. Mr. Johnsey and Mr. Fine timely filed notices of appeal from the district court's ruling.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

This case was brought in the district court under the Racketeer Influenced And Corrupt Organizations Act, 18

---

which included Count One and the other counts, which included Count Fourteen, which we're now talking about.

Tr. 12,756-12,757.

U.S.C. § 1961 *et seq.*, The Hobbs Act, 18 U.S.C. § 1951 (a), the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute. 18 U.S.C. § 1343.

REASONS FOR GRANTING THE WRIT

The opinion below decides an important question of federal law which has not been, but should be, settled by this Court. Specifically, the Fifth Circuit's opinion condones the prosecution's deliberate tactic of joining wholly-unrelated offenses and defendants under the guise of RICO in order to improve the chances of conviction, when the prosecution knew that a mistrial necessarily would result from such action if a conviction was not ultimately obtained on Count One, thereby acquiring through design a second chance at conviction. While the propriety of such action has not heretofore been presented to this Court or any other federal court, petitioners respectfully submit that such action on the part of the prosecution constitutes "prosecutorial overreaching" of the type which, under the Double Jeopardy Clause, bars a second trial.

The decision below should also be reviewed because the Fifth Circuit erroneously applied the "clearly erroneous" standard in reviewing the district court's findings of fact with respect to the issue of Double Jeopardy. In this regard, the decision below was contrary to an earlier decision of the United States Court of Appeals for the Fifth Circuit, which held that the "clearly erroneous" standard is inappropriate for the review of Double Jeopardy issues. By applying the "clearly erroneous" standard, the Fifth Circuit may not have afforded the petitioners a full and complete consideration of the circumstances which resulted in the mistrial.

ARGUMENT

I. The Prosecution's Deliberate Joinder of Wholly-Unrelated Offenses and Defendants in Order to Improve the Chances of Conviction Constitutes Prosecutorial Over-Reaching Which Bars Reprosecution.

The Fifth Amendment to the United States Constitution declares in pertinent part that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ."[7] This Court has consistently held that where a trial has been terminated by declaration of a mistrial without the defendant's request or consent, the Double Jeopardy Clause bars reprosecution unless there existed a "manifest necessity" for the mistrial. *E.g. United States v. Dinitz*, 424 U.S. 600, 607 (1976); *United States v. Jorn*, 400 U.S. 470, 481 (1971). In addition, this Court has held that where a defendant moves for mistrial as a result of "prosecutorial overreaching", the defendant's mistrial request

[7]This court recently explained the policies behind and interests protected by the Double Jeopardy Clause, as follows:

> The Double Jeopard Clause of the Fifth Amendment protects a defendant in criminal proceedings against multiple punishments and repeated prosecutions for the same offense. *See United States v. Wilson*, 420 U.S. 332, 343, 95 S. Ct. 1013, 1021, 43 L.Ed. 2d 232, 241; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed. 2d 656, 664. Underlying this constitutional safeguard is a belief that "the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L.Ed. 2d 199, 204. Where, as here, a mistrial has been declared, defendants "valued right to have his trial completed by a particular tribunal" is also implicated. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L.Ed. 974, 978; *United States v. Jorn*, 400 U.S. 470, 484-485, 91 S. Ct. 547, 556-557, 27 L.Ed. 2d 543, 556 (plurality opinion); *Downum v. United States*, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L.Ed. 2d 100, 102.

United States v. Dinitz, 424 U.S. 600, 606 (1976) (footnote omitted).

does not remove the barrier to a retrial mandated by the Double Jeopardy Clause.[8] *United States v. Dinitz*, 424 U.S. 600, 607 (1976); *United States v. Jorn*, 400 U.S. 470, 485

---

[8]This Court in *Dinitz* explained the distinction between mistrials declared without the defendant's consent and mistrials granted upon the defendant's request, as follows:

> The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn, supra*, at 484, S. Ct. at 557, 27 L.Ed. 2d at 556. . . . But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause—the avoidance of the anxiety, expense and delay occasioned by multiple prosecutions.
>
> . . . . In such circumstances, the defendant generally does face a "Hopson's choice" between giving up his first jury and continuing a trial tainted by prejudical, judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.
>
> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States v. Jorn, supra*, 400 U.S., at 45, 91 S. Ct. at 557, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum v. United States*, 372 U.S., at 736, 83 S. Ct., at 1034, 10 L.Ed. 2d, at 102. *See Gori v. United States*, 367 U.S., at 369, 81 S. Ct., at 1526, 6 L.Ed. 2d 905; *United States v. Jorn, supra*, 400 U.S., at 489, 91 S. Ct., at 559, 27 L.Ed. 2d at 558 (Stewart, J., dissenting); *C. F. Wade v. Hunter*, 336 U.S., at 692, 6 S. Ct., at 8, 93 L.Ed., at 979.

United States v. Dinitz, 424 U.S. at 608-611, 96 S. Ct. at 1080-1081 (footnote omitted).

(1971). The Fifth Circuit recently interpreted *Dinitz, supra* and *Jorn, supra* as follows:

> These definitive statements by the Supreme Court make it clear that under ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule — rare cases involving circumstances which are "attributable to prosecutorial ** overreaching," *Jorn, supra,* 400 U.S., at 485, 91 S. Ct., at 557, 27 L.Ed. 2d at 556. Where "prosecutorial overreaching" exists, a defendant's mistrial request does not remove the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.
>
> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. This safeguard against "prosecutorial overreaching" provided defendants by the Fifth Amendment's Double Jeopardy Clause complements the "inestimatable safeguard against the *** overzealous prosecutor" provided by jury trial.
>
> Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was "prosecutorial overreaching" is our inquiry. If "prosecutorial overreaching" is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.
>
> To find "prosecutorial overreaching," the government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction." *United States v. Dinitz, supra,* ..... U.S., at

....., 96 S. Ct., at 1080, 47 L.Ed. 2d at 374, 44 U.S. L.W., at 4312.

United States v. Kessler, 530 F.2d 1246, 1255-1256 (5th Cir. 1976) (footnotes omitted).

While the basis of Petitioners' Double Jeopardy motion has not heretofore been advanced, there can be no question but that the prosecutors' conduct in joining wholly-unrelated charges and defendants, considering the totality of the circumstances, constitutes "prosecutorial overreaching" sufficient to bar retrial of the Petitioners. The issue in the present case is not whether proper action of the prosecutor designed to improve the chances of obtaining a conviction on multiple counts in one proceeding justifies dismissal of the charges, but, rather, it is whether the prosecutor is entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial necessarily will result from such actions if a conviction is not ultimately obtained, thereby acquiring through design a second chance at conviction.

In the instant case, the prosecution obtained a nineteen count indictment charging in Count One a violation of RICO by all defendants through predicate crimes wholly-unrelated to one another, and charging in Counts Two through Nineteen the unrelated crimes charged as predicate acts in Count One. The indictment was based on a grand jury investigation conducted by the prosecution lasting eighteen months. The prosecutors who conducted the grand jury investigation were experienced and knew the evidence available to them to prove the allegations of the indictment. Clearly, the prosecutors knew that under the circumstances, absent the RICO count, the defendants and unrelated crimes consolidated under this indictment could not have been joined in a single indictment. Thus, the prosecution knew at the time it obtained the indictment,

and throughout the proceedings, that if a conviction was not obtained on Count One, a mistrial necessarily would result as to the remaining substantive counts, due to the inflammatory nature of the evidence presented to the jury on Count One.

In the end, the prosecutors failed to adduce sufficient evidence to prove the critical allegations of the RICO enterprise and conspiracy charged in Count One. In the trial court's own words, the evidence "did not just fail, but it failed in a very significant and almost startling way." Tr. 12,802. Thus petitioners, as well as the other defendants, became prisoners for ten and one-half weeks in an expensive, exhausting, emotionally frightening scenario orchestrated by the prosecutors' pernicious joinder of eight defendants and wholly-unrelated offenses under the guise of RICO.

In light of the prejudicial evidence that had been presented to the jury, petitioners had no choice but to move for a mistrial. This fact was acknowledged by the Fifth Circuit, which observed that "the record of inflammatory material . . . presented to the jury makes clear that the risk of continuing with that jury was so overwhelming as to effectively force a mistrial." Opinion, Appendix at pg. A-7, n. 10. The fact that the prosecution did not oppose Petitioners' motion for mistrial supplies direct evidence that the prosecution agreed with this proposition. Tr. 12,770. As a result, the prosecution knowingly undertook to improve its chances of obtaining a conviction on the unrelated crimes joined in Count One, with the intent that it would get a second chance at conviction as a result of a mistrial should it fail to bear its burden of proving the allegations of Count One. Under the totality of circumstances involved in the present case, the prosecution's actions warrant dismissal of the remaining charges.

II. The Fifth Circuit Erred in Applying an Improper Standard of Review.

The Fifth Circuit, in passing upon the Double Jeopardy issues raised by the instant case, employed the "clearly erroneous" standard of review in reviewing the district court's findings of fact.[9] While this court has not heretofore considered the proper standard of review of Double Jeopardy issues, the standard used by the Fifth Circuit is in conflict with a recent decision by the same court. In *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir. 1981), the Fifth Circuit declared:

> It is settled that findings of fact by the district court . . . will not be set aside unless clearly erroneous. *Wade v. Mayo*, 334 U.S. 672, 683-84, 68 S. Ct. 1270, 1276, 92 L.Ed. 647 (1948); *United States v. Cruise*, 581 F.2d 535, 541 (5th Cir. 1978), and cases cited therein. *See Fed.R.Civ.P.*, 52 (a); *5A Moore's Federal Practice*, ¶ 52.03[1] (2nd Ed. 1980). However, it is equally settled that conclusions of law are not binding on appellate courts and that we are free to substitute our judgment for the district courts on the law. *Horn v. C. L. Osborn Contracting Company*, 591 F.2d 318, 320 (5th Cir. 1979); *5A Moore's Federal Practice*, ¶ 52.03 [2] (2nd Ed. 1980). Mixed questions of law and fact, likewise, are not protected by the clearly erroneous rule. *9 Wright & Miller, Federal Practice and Procedure*, §2589 at 753-54 (1971); *See Backar v. Western States Producing Company*, 547 F.2d 876, 884 (5th Cir. 1977). Since violation of the double jeopardy clause is a question of law, *United States v. Nickerson*, 211 F.2d 909, 912 (2nd Cir. 1954), *we are not bound*

---

[9] In this regard, the Fifth Circuit stated:

> Presented with opposing critical reviews of that drama, containing only those segments favoring each critic's evaluation, we can but look for clear evidence that the first reviewer, who was on the scene, was wrong.

Opinion, Appendix at pg. A-5.

> *by the clearly erroneous standard.* (Emphasis in text supplied).

Thus, the Fifth Circuit has ruled that the "clearly erroneous" standard is inappropriate for review of Double Jeopardy issues.

The import of this conflict is obvious. In the context of the present action, the "clearly erroneous" standard applied by the Fifth Circuit may have seriously limited the scope of review. Rather than feeling compelled to study the entire record of the ten and one-half week trial, and the twenty-four month period immediately preceding, the panel may have looked only for evidence supporting the district court's decision. Full and complete consideration of the law, and application of all facts of this case to that law, thus may well have been precluded by the standard of review employed by the Fifth Circuit.

CONCLUSION

In *Berger v. United States*, 295 U.S. 78, 88 (1935), this court declared:

> The United States attorney is the representative not only of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In the present case, the prosecution deliberately joined wholly-unrelated offenses and defendants in a single indictment without just cause in order to improve the chances of conviction, when they knew that a mistrial necessarily would result from such actions if convictions were not ultimately obtained on Count One, thereby acquiring through design a second chance at conviction. The prosecution vigorously fought all attempts directed at severance and separate trials on the basis that they possessed sufficient admissible relevant evidence to create a jury issue on the critical allegations of a RICO enterprise and conspiracy charged in Count One. However, in the end, the prosecution "failed in a very significant and almost startling way" to prove the critical allegations of Count One. As the trial court declared, "a more detailed and careful examination of the evidence prior to the indictment could have dictated that it not be brought." Tr. 29, Nov. 25, 1980. Clearly, the governments actions in this regard constitute "prosecutorial overreaching". Only through their unjustified actions were the prosecutors able to place highly inflammatory and prejudicial material before the jury – material which necessarily resulted in a mistrial after all defendants had been acquitted on the RICO count.

These defendants are now faced with defending themselves a second time, the second trial having been necessitated solely by the prosecution's unjustified desire to try together eight different defendants accused of distinctly different crimes, thereby enhancing the possibility of convicting all. Retrial of these petitioners is harassment of the very sort the Double Jeopardy Clause is designed to prevent. Therefore, retrial of Counts Fourteen through Nineteen is barred by the Double Jeopardy Clause.

In addition, the Fifth Circuit improperly employed the "clearly erroneous" standard in this case as the standard of

review. In the context of Double Jeopardy issues, application of this standard seriously limited the scope of review, and denied petitioners the full and complete consideration of all the facts of the instant case to which they are entitled.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

L. DREW REDDEN,
Redden, Mills & Clark
940 First Alabama Bank Building
Birmingham, Alabama 35203
Telephone: (205) 322-0457

F. TIMOTHY MCABEE
Sirote, Permutt, Friend,
Friedman, Held & Apolinsky, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35255
Telephone: (205) 933-7111

Counsel for Walter F. Johnsey, Petitioner

PHILLIP A. WITTMAN
STEPHEN H. KUPPERMAN,
Stone, Pigman, Walther,
Wittmann & Hutchinson, P.A.
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Counsel for Joseph L. Fine, Petitioner

PROOF OF SERVICE

I, L. Drew Redden, attorney for Walter F. Johnsey, an individual, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 23rd day of July, 1981, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Hon. Frank Donaldson, United States Attorney, 200 Federal Court House, Birmingham, Alabama 35203.

It is further certified that all parties required to be served have been served.

This the 23rd day of July, 1981.

L. Drew Redden

L. DREW REDDEN
Attorney for Walter F. Johnsey, Petitioner
940 First Alabama Bank Building
Birmingham, Alabama 35203
Telephone: (205) 322-0457

81-151

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

JOE L. FINE and WALTER F. JOHNSEY,
Petitioners.

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

L. DREW REDDEN
Redden, Mills & Clark
940 First Alabama Bank Building
Birmingham, Alabama 35203
(205) 322-0457

F. TIMOTHY MCABEE
Sirote, Permutt, Friend,
Friedman, Held & Apolinsky, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35255
(205) 933-7111
Counsel for Walter F. Johnsey, Petitioner

PHILLIP A. WITTMAN
STEPHEN H. KUPPERMAN
Stone, Pigman, Walther, Wittman
& Hutchinson, P.A.
1000 Whitney Bank Building
New Orleans, Louisiana 70130
(504) 581-3200
Counsel for Joseph L. Fine, Petitioner

TABLE OF CONTENTS

	Page
Fifth Circuit Opinion	**A-1**
Fifth Circuit Denial of Rehearing	**A-10**
District Court Judgment	**A-12**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7987

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOE L. FINE and WALTER F. JOHNSEY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama
(April 27, 1981)

Before MARKEY*, Chief Judge, HILL and THOMAS A. CLARK, Circuit Judges.

MARKEY, Chief Judge:

After a judgment of acquittal on certain counts, and declaration of a mistrial on other counts, Johnsey and Fine moved to dismiss the remaining counts on Double Jeopardy grounds. This appeal is from denial of that motion. We affirm.

Background

In October 1979, following an 18-month investigation by a grand jury, a 32 page, 19-count indictment was returned. Named defendants were the Drummond Company, three of its officers (Gary Neal Drummond, Elbert A. Drummond, and Clyde Clifton Black), Walter F. Johnsey, Joe L. Fine, Eddie Herbert Gilmore, and Jack Biddle. All defendants were charged in Count 1 (the RICO count) with violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* Counts 2 through 12 charged the three company officers with mail fraud transactions with a George Jones. Count 13 charged Johnsey and the Drummonds with

*Of the U.S. Court of Customs and Patent Appeals, sitting by designation.

wire fraud transactions with First Virginia Mortgage and Real Estate Investment Trust Company. Count 14 charged Fine with using his state Senator position to extort money from Gerald Ingle. Counts 15 through 19 charged Johnsey and Fine, in mail fraud terms, with devising, with Norman Reid, a scheme to defraud Alabama Power Company of the loyal services of its employee, Johnsey, and to deprive Alabama's citizens of their right to honest government.

Defendants Johnsey and Fine moved to dismiss Count 1 and for severance. The government strenously opposed the motions, relying heavily on particular language in this court's opinion in *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom Delph v. United States*, 439 U.S. 953 (1978). Though the trial court expressed reservations on whether the government could sustain RICO count 1, it denied the motions. In pretrial proceedings, the trial court warned the government of the necessity of establishing the existence of an enterprise and a conspiracy. The government told the court it would first establish the existence of a conspiracy and that defendants were members of it, before introducing statements of co-conspirators. *United States v. James*, 590 F.2d 575 (5th Cir.). *cert. denied*, 442 U.S. 917 (1979).

After six months of discovery and skirmish,[1] trial began on May 5, 1980. In two months of virtually continuous trial, defendants and the court repeatedly asked that the government submit proof purporting to establish the existence of the "enterprise" and conspiracy required to undergird a RICO count. Exhibiting a monumental patience, expressing appropriate concern for the onerous burden on defendants, and relying on the government's repeated promises to "connect it up," the trial court permitted the government to present to the jury weeks of inflammatory testimony and

[1]Much of which was occasioned by the extensive pretrial publicity given the case. Publicity continued during the trial. The trial court was driven, by the government's repeated failures to make timely and complete delivery of *Jenck's* materials and similar items, to state that it had become "weary of this continual bickering" over such matters.

exhibits relating to what the government viewed as predicate crimes without the submission of proof going to the existence of an enterprise and conspiracy.[2] On July 8, 1980, the court entered a judgment of acquittal on Count 1. On July 11, 1980, the court granted motions for acquittal on Counts 2-13, on which the government had introduced all of its evidence. Those actions left only Johnsey and Fine as defendants, and only Counts 14-19 as pending.

The government made a proffer to the court of anticipated evidence relating to counts 14 through 19. A motion of Johnsey and Fine for a mistrial on those counts was granted.

In November 1980, Johnsey and Fine moved for dismissal of counts 14 through 19, on the ground that their reprosecution on those counts would violate the double jeopardy clause of the Fifth Amendment to the Constitution. Intentional misconduct of the government was alleged to lie in its joinder of "eight defendants on wholly unrelated charges that it sought to cross fertilize under the umbrella of RICO." On November 24, 1980, the trial court orally denied the motions. On November 25, 1980, the Clerk's Minutes reflecting that decision were issued, and Johnsey and Fine noticed this appeal. On November 26, 1980, the trial court entered an order holding the motions to dismiss not to have been frivolous.

Issue

The sole issue before us is whether the trial court correctly determined that retrial of Johnsey [sic] on Count 14, and retrial of Johnsey and Fine on Counts 15 through 19, are not

[2]In a pre-trial conference, and contrary to its earlier assurance that it would establish it early on, the government argued that it had until the "close of the Government's case" to prove the existence of an enterprise and conspiracy, going so far as to recognize and accept the continuing necessity "right up to the end," for the trial court to supply repeated rulings on hearsay and other evidentiary objections, and asserting that the jury could infer existence of an enterprise from the evidence of the predicate crimes alone. Before us, the government refers to the judgment of acquittal on Count I as occurring "midtrial," apparently still under the impression that it could try defendants for another two months without submission of proof going to the existence of an "enterprise."

barred by the double jeopardy clause of the Fifth Amendment.

OPINION

The court is again confronted with the necessity of balancing the numerous competing interests surrounding application of the double jeopardy clause, an area of the law it has often visited. In *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976), a case primarily relied on here by Johnsey and Fine, the court emphasized the interest in discouraging intentional prosecutorial misconduct designed to provoke a mistrial and thus produce a second and improved chance to try a defendant. In that case, the prosecutor had introduced hearsay of a person known to be unavailable and had introduced a known false exhibit, a rifle. *In United States v. Crouch*, 566 F.2d 1311 (5th Cir. 1979), and in *United States v. Garza*, 603 F.2d 578 (5th Cir. 1979), the court referred to the interest in preserving the freedom of trial courts to declare mistrials, without undue fear that an effective acquittal will result when an appellate court finds prosecutorial misconduct and orders dismissal of the indictment.

In other mistrial-double jeopardy cases in this court,[3] and in the Supreme Court,[4] other interests, expressed or no, were present and to varied degrees influential, e.g., the accused's interest in preserving his or her right to a fair trial, the public's interest in maintaining the integrity of the judicial process by discouraging undue profit to either accused or accuser in requesting or provoking a mistrial, the societal

[3]See, e.g., *Cherry v. Director, State Board of Corrections*, 635 F.2d 414 (5th Cir. 1981), *Baker v. Metcalfe*, 633 F.2d 1198 (5th Cir. 1981), *United States v. Opager*, 616 F.2d 231 (5th Cir. 1980). See, also, cases cited in the text.

[4]See, e.g., *Arizona v. Washington*, 434 U.S. 497 (1978). The Supreme Court has rejected the concept of a "rigid, mechanical rule," for application to double jeopardy and retrial questions. *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S. Ct. 1066, 1072, 35 L.Ed. 425 (1973). See, also, cases cited in the text.

interest in having the issue of a defendant's guilt or innocence litigated, and the public interest in assuring that a prosecutor's proper parameters of performance do not expand into a prosecutor's vicious vendetta of vindictiveness.

Present also is the deference due the determination of the trial judge, infinitely more familiar than are we with all actions, words, and attitudes of the actors in the eight-month drama played before him. Presented with opposing critical reviews of that drama, containing only those segments favoring each critic's evaluation, we can but look for clear evidence that the first reviewer, who was on the scene, was wrong.

Before us, the parties devote their briefs and argument primarily to a review of the prosecutor's actions, from convening the grand jury on. Johnsey and Fine, refusing any role to human frailty, honest mistake, or incompetence, cite apparent shortcomings in the prosecutor's evidence, in its presentation to the grand jury and the court, in the prosecutor's broken promises to the court, and in the prosecutor's questioning of witnesses. All of that, they say, stemmed from either gross negligence or from an intentional and improper prosecutorial design to convict at all costs.

Johnsey and Fine thus emphasize society's interest in even-handed, objective prosecution limited to the facts and the law. The government explains its conduct in this case as stemming from its duty to prosecute a grand jury's indictment,[5] from an honest belief that this court's opinion in *Elliott* authorized joinder of these eight defendants and 18 counts under a RICO count, and from a sincere belief that a jury could infer existence of an enterprise from evidence of separate crimes.[6] In sum, Johnsey and Fine attribute im-

[5]The prosecutor's implication of complete divorcement from the indictment, and of a duty to enforce every indictment however unfounded, is at best inappropriate.

[6]Though recognizing that it has no right to appeal an acquittal, and without reference to acquittal as reflecting innocence in the eyes of the law, the government devotes a substantial segment of its brief and argument to assertions that various defendants did perform the acts of which they were acquitted.

proper motives to the prosecutors and the government asserts an unassailable prosecutorial purity.[7]

Johnsey and Fine have been subjected to a very expensive ordeal, having survived an eighteen month grand jury investigation, six months of pretrial proceedings, a two month trial, and the prosecutor's resistance to this appeal.[8] Their motion to dismiss counts 14-19, as was said in relation to a mistrial request in *United States v. Dinitz*, 424 U.S. 600 (1976), has as its objective—"The avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." Their plight, in light of what they view as an unnecessary RICO prosecution occasioned only by prosecutorial mischief, creates an emotional aura of sympathy.[9] Moreover, the interest of Johnsey and Fine in being free of prosecutor-produced multiple prosecutions must weigh heavily in the scales. Their present motion, however, must be decided on the facts and established decisional tools applicable to double jeopardy questions.

A primary tool, controlling here, looks to the cause of the mistrial. When that cause lies in action of the prosecution, whether it forces defendant to request mistrial or produces a *sua sponte* court declaration, the touchstone lies in analysis

---

[7]Both parties' briefs are replete with unseemly and unhelpful characterization of opposing counsels' motives. Because the court is concerned with application of law to established facts, not with motives impossible with certainty to fathom, pejoratives are purposeless.

[8]The government sought unsuccessfully below to consolidate this case with cases based on indictments for violation of the Internal Revenue Laws. The tax indictment of Johnsey has been entirely dismissed. Four of five tax counts against Fine have been dismissed. In a colloquy with the court, the prosecutor indicated that the remaining tax count against Fine would probably not be tried.

[9]The government says it informed attorneys for Johnsey and Fine of their right to appeal the denial of their motion to dismiss counts 14-19 on double jeopardy grounds. It nonetheless attacked this appeal, in its Motion For An Expedited Appeal in this court, as "spurious" and brought "in bad faith" for the "sole purpose of delay." At oral argument, the government requested almost immediate disposition of this appeal. As reflected in the text, the interests involved and facts of record compel careful, contemplative consideration and preclude a rush to judgment.

of that action. Mere error, though it may justify a mistrial, will not normally form a basis for dismissal. The prosecutorial action causing a mistrial must descend to the level of intentional misconduct, gross negligence, or "prosecutorial overreaching."[10]

In analyzing the prosecutor's actions here, we look only to those heard or observed by the jury, that is, those actions that so tainted or prejudiced the jury as to have forced the defendants to forego their right to go to that jury "and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn*, 400 U.S. 470, 484 (1971).[11]

The prosecutorial actions before the jury relied on by Johnsey and Fine included errors in evaluating and presenting evidence and in questioning a witness. We have reviewed each with care. It cannot be said on this record whether those errors were caused by inexperience or negligence. It can, however, be said that if they resulted from negligence, it was not such gross negligence as to warrant dismissal of counts 14-19.[12] The prosecutorial errors cited are to be decried but not graded at the level of intentional misconduct, gross negligence, or prosecutorial overreaching. In all events, those errors cannot be described as designed and intended to provoke a mistrial, nor do Johnsey and Fine so describe them.

---

[10]See the cases listed in notes 3 and 4, supra. Though the government argues that Johnsey and Fine were not forced to seek a mistrial, the record of inflammatory material it presented to the jury makes clear that the risk of continuing with that jury was so overwhelming as to effectively force a motion for mistrial.

[11]Johnsey and Fine cite numerous actions of the prosecution unknown to the jury, in an apparent effort to paint a picture of overall prosecutorial intent. However eggregious may be such out-of-court actions, however closely they may skirt the edge of overreaching, they could supply no basis for dismissing counts 14-19 unless they somehow affected the trial. See *United States v. Morrison*, 49 U.S.L.W. 4087, 4089 (1981).

[12]The parties dispute whether evidence touching counts 14-19 was introduced at the trial. The dispute is irrelevant, double jeopardy becoming fixed, if it does, when a jury is selected and sworn at the first trial. *United States v. Jorn*, 400 U.S. 470, 479-80 (1971), *Downum v. United States*, 372 U.S. 734 (1963), *Green v. United States*, 355 U.S. 184, 188 (1957), *Wade v. Hunter*, 336 U.S. 684, 688 (1949).

Indeed, Johnsey and Fine place their greatest if not total reliance on the prosecutor's action in deliberately and intentionally obtaining, and adamantly pursuing, an indictment of eight defendants under a RICO count the prosecutor knew or should have known was without foundation.[13]

Recognizing at oral argument the inability of the record to establish that the prosecutor employed the RICO count for the purpose of provoking a mistrial, Johnsey and Fine argue for a holding that a prosecutor's action designed to improve his or her chances of obtaining a conviction should produce the same result as one designed to provoke a mistrial. That brush sweeps too broadly, for many proper actions of the prosecutor are presumably designed to enhance the odds on conviction. The issue is not whether the prosecutor's blows were hard, but whether they were foul. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Johnsey and Fine assert that the prosecutor here employed an unwarranted interpretation of *Elliott* to justify joining these eight defendants, and, by submitting extensive evidence of predicate crimes unrelated to each other, sought thereby to improve the chance of convicting all defendants on the RICO count. Assuming the correctness of that assertion,[14] a

---

[13]The government argues that the characterizations of "deliberate" and "intentional," and the allegation that prosecutors "knew" a RICO foundation was lacking, are newly presented to this court, and that argument below on the motion to dismiss rested on the mere bringing of the RICO charge. Johnsey and Fine from the very start asserted the absence of foundation, and the trial court from pre-trial proceedings onward questioned whether a foundation existed. Nonetheless, we cannot on this record look into the prosecutors' minds and determine that bringing and maintaining a RICO count, though misguided, was not sincerely believed to be a proper action, or that the prosecutors did not sincerely believe that Johnsey, Fine, and the trial court were simply wrong and they were right.

[14]The government persists in asserting before us the correctness of its interpretation of *Elliott*, and attributes its failure on Count 1 below to the trial court's "narrow" interpretation of the opinion in that case. The issue below was never, however, whether numerous defendants may be joined under a RICO count. The issues were whether there was in *this* case sufficient evidence of an "enterprise," and whether the government followed the proper *order of proof* of existence of that enterprise. *Elliott*

prosecutor's misinterpretation of a court opinion, without more, and whether the interpretation would or would not improve the chance of conviction, does not descend to the level of intentional misconduct, gross negligence, or prosecutorial overreaching sufficient to warrant dismissal of an indictment.[15]

Conclusion

In *Kessler*, supra, intentional misconduct and eggregious overreaching of the prosecutor before the jury resulted in dismissal of the indictment. The public interest in maintaining the integrity of the judicial process and of the office of prosecutor was there paramount. The prosecutor's actions here complained of do not descend to the level of those in *Kessler*, and the public interest in assuring that criminal charges be fairly and fully tried to a conclusion of conviction or acquittal, "the public's interest in fair trials designed to end in just judgments," *Wade v. Hunter*, 336 U.S. 684, 689 (1949), outweighs the competing interests asserted.[16]

AFFIRMED

---

did not delete the requirement for proof of the existence of an enterprise under RICO, nor did it effect the preference expressed in *James* for establishing the enterprise early on at the trial.

[15]It is not argued that the procedure intentionally employed a knowingly false RICO count to get a second chance at proving the predicate crimes when the RICO count failed and a mistrial was declared on the counts charging the predicate crimes. Johnsey and Fine do point to the prosecutors' statement that they would "still" have the other counts when the trial court asked where they would be if the RICO count failed, but there is no evidence that the prosecutors' "still" encompassed more than the one prosecution. Presumably, the courts would cast a heavily jaundiced eye upon an abusive employment of the RICO statute in which it is used solely as a means of insuring multiple prosecutions of separate crimes.

[16]It need hardly be said that our affirmance implies nothing whatever relating to the validity of the charges embodied in counts 14-19. We are confident that the prosecutors will recognize that, like all defendants, Johnsey and Fine are presumed innocent of those charges, unless and until they are proved guilty thereof in the due process of law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7987

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOE L. FINE,
WALTER F. JOHNSEY,
Defendants-Appellants

Appeals from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 27, 1981, 5 Cir., 198 , F.2d).
(May 26, 1981)

Before MARKEY*, Chief Judge, HILL and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit

*Of the U.S. Court of Customs and Patent Appeals, sitting by designation

Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

vs

DRUMMOND COAL COMPANY;
ET AL

CASE NUMBER:
CR 79-M-00276-S

JUDGMENT

CLERK'S COURT MINUTES

This action came on for oral argument on motions of defendants, Walter F. Johnsey and Joe L. Fine, to dismiss counts fourteen (14) through nineteen (19) of the indictment on grounds of double jeopardy, on November 24, 1980, before the Court, Honorable Frank H. McFadden, Chief United States District Judge, presiding, and the issues having been duly heard,

It is ORDERED and ADJUDGED that the motions of defendants, Walter F. Johnsey and Joe L. Fine, to dismiss counts fourteen (14) through nineteen (19) of the indictment on grounds of double jeopardy are denied.

DATED: November 24, 1980
Birmingham, Alabama
Court Reporter: David Maxwell

JAMES E. VANDERGRIFT, CLERK

BY: /s/ RITA F. DURNAK
DEPUTY CLERK

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS
CLERK

No. 81-151

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOE L. FINE AND WALTER F. JOHNSEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Baker v. *Metcalfe*, 633 F. 2d 1198 ..... 4, 5

Mitchell v. *Smith*, 633 F. 2d 1009, cert. denied, 449 U.S. 1088 6

State v. *Kennedy*, 49 Or. App. 415, 619 P.2d 948, cert. granted, No. 80-1991 (Oct. 13, 1981) 6

United States v. *DiFrancesco*, 449 U.S. 117 3

United States v. *Dinitz*, 424 U.S. 600 ..... 3, 5

United States v. *Green*, 636 F. 2d 925, cert. denied, No. 80-6039 (Apr. 20, 1981) 6

United States v. *Jorn*, 400 U.S. 470 5-6

United States v. *Kessler*, 530 F. 2d 1246 ..... 4, 6

United States v. *Leppo*, 641 F. 2d 149 6

United States v. *Rios*, 637 F. 2d 728 6

United States v. *Roberts*, 640 F. 2d 225 6

Constitution and statutes:

United States Constitution, Fifth Amendment, Double Jeopardy Clause 1, 3, 4, 6

18 U.S.C. 1341 1

18 U.S.C. 1343 2

18 U.S.C. 1951(a) 2

18 U.S.C. 1962(d) 1

Page

Constitution and statutes—Continued:

Ala. Code (1975):

§ 13-5-31 1
§ 13-5-32 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-151

JOE L. FINE AND WALTER F. JOHNSEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Double Jeopardy Clause bars their retrial on the remaining counts of an indictment. A mistrial with respect to those counts was declared at petitioners' request after judgments of acquittal were entered on the other counts.

1. Petitioners, five other individuals, and the Drummond Coal Company were named in a 19-count indictment filed in the United States District Court for the Northern District of Alabama. The charges centered on illegal practices in the Alabama coal mining industry. Count 1, the only count in which all defendants were named, charged a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). The pattern of racketeering activity was alleged to consist of multiple acts of mail fraud (18 U.S.C. 1341), bribery (Ala. Code §§ 13-5-31, 13-5-32 (1975), wire fraud

(18 U.S.C. 1343), and extortion (18 U.S.C. 1951(a)). In the remaining counts, various defendants were charged with substantive crimes committed in furtherance of the conspiracy (Pet. App. A-1 to A-2).

Petitioner Johnsey, a member of the Drummond board of directors, was charged with conspiracy (count 1), one count of wire fraud (count 13), and five counts of mail fraud (counts 15-19). Petitioner Fine, an Alabama state senator, was charged with conspiracy (count 1), extortion (count 14), and five counts of mail fraud (counts 15-19) (Pet. App. A-1 to A-2).

Before trial, the defendants attacked the sufficiency of the conspiracy count and moved to sever that count from the rest of the indictment (Pet. App. A-2). The district court denied those motions (*id.* at A-2, A-12).

At trial, the government began by presenting evidence on the first 13 counts (Pet. App. A-2 to A-3). After hearing much of the government's proof on those counts and after receiving a proffer outlining the remaining evidence relevant to those charges, the court entered judgments of acquittal on counts 1 through 13 (*id.* at A-3). At petitioners' request, the court also declared a mistrial on counts 14 through 19, the counts on which no evidence has as yet been offered (*ibid.*).

Prior to retrial, petitioners moved for dismissal of counts 14 through 19 on double jeopardy grounds, claiming that the mistrial had been caused by intentional misconduct on the part of the prosecution (Pet. App. A-3). Petitioners asserted that the government had knowingly prosecuted a groundless conspiracy charge in order to improve the chances of conviction on the remaing counts (*ibid.*; Memorandum in Support of Motion to Dismiss Counts 14-19, at 3). The district court denied petitioners' motions, however,

finding neither intentional misconduct nor that the prosecution had been "grossly negligent" in seeking the indictment or in bringing it to trial (Nov. 25, 1980 Tr. 29).

On appeal prior to retrial, petitioners raised the same double jeopardy argument, but it was again rejected. The court of appeals found no support in the record for petitioners' allegation that the government had prosecuted the conspiracy charges in bad faith (Pet. App. A-8 n.13). The court added (*id.* at A-8 to A-9) that even though the prosecution's case might have been based upon an erroneous interpretation of the applicable law, "a prosecutor's misinterpretation of a court opinion, without more * * * does not descend to the level of intentional misconduct, gross negligence, or prosecutorial overreaching sufficient to warrant dismissal of an indictment."

The court also considered (Pet. App. A-7) several additional allegations of prosecutorial misconduct made by petitioners in an effort to buttress their double jeopardy claim. The court stated that it had reviewed each allegation with care but had found no "intentional misconduct, gross negligence, or prosecutorial overreaching" (*ibid.*). The court therefore affirmed the denial of petitioners' motions to dismiss the indictment. Petitions for rehearing with suggestions for rehearing en banc were denied, with no judge voting in petitioner's favor (Pet. App. A-10 to A-11).

2. The court of appeals correctly held that the Double Jeopardy Clause does not bar the retrial of petitioners on the remaining counts of the indictment. "[R]eprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the government did not deliberately seek to provoke the mistrial." *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980). See also *United States* v. *Dinitz*, 424 U.S. 600, 606-611 (1976). In the court of appeals, petitioners conceded "the inability of the record to establish

that the prosecutor employed the RICO count for the purpose of provoking a mistrial" (Pet. App. A-8), and their petition does not contend that the government acted with that end in view. Thus, their double jeopardy argument necessarily fails.

Citing *United States* v. *Kessler*, 530 F. 2d 1246, 1255-1256 (5th Cir. 1976), petitioners maintain (Pet. 12-14) that the Double Jeopardy Clause bars retrial if a successful defense mistrial motion is provoked by the prosecution's "gross negligence" or "intentional misconduct." But even under that test, it is clear that petitioners' retrial is not precluded. Both the trial court, which was in the best position to assess the prosecutor's conduct and motives,[1] and

---

[1]Petitioners assert that the court of appeals employed the "clearly erroneous" standard of review in considering their double jeopardy claims and that the court's decision conflicts in this respect with a decision handed down a few months earlier by another panel of the same court (*Baker* v. *Metcalfe*, 633 F. 2d 1198 (5th Cir. 1981)). However, any conflict among the decisions of a single circuit is properly a matter for that circuit to resolve, and petitioners brought their asserted conflict to the attention of the court of appeals both in their rehearing petition and in their suggestion for en banc review. Moreover, it is apparent that no conflict exists. As we understand the opinion below, the statements concerning the "clearly erroneous" standard of review were meant to apply only to the district court's factual findings relevant to the double jeopardy issue (see Pet. App. A-5). Those findings concerned the government's motives and intent in prosecuting the conspiracy charge. In order to make those findings, it was necessary to understand and assess much of what had occurred during the six months of pretrial proceedings and two months of trial. Therefore, it was wholly appropriate for the court of appeals to accord significant deference to the trial court's factual determinations (see Pet. App. A-5). Nevertheless, the court of appeals reviewed each of petitioners' allegations with care and made an independent determination as to whether any prosecutorial errors amounted to "gross negligence" or "intentional misconduct" (Pet. App. A-7). The approach of the panel below does not conflict with *Baker* v. *Metcalfe*, *supra*. There, the issue was whether facts not in dispute showed prosecutorial misconduct or bad faith, and the court stated: "Since violation of the double jeopardy clause is a question of law * * *, we are not bound by the clearly erroneous

the court of appeals, which carefully reviewed the record, concluded that there had been no "intentional misconduct" or "gross negligence" sufficient to prevent retrial. Further review of this largely factual question is therefore unwarranted.

Before this Court, petitioners frame the issue posed by this case as follows: "[W]hether the prosecutor is entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial necessarily will result from such actions *if a conviction is not ultimately obtained*, thereby acquiring through design a second chance at conviction" (Pet. 13 (emphasis added); see also Pet. 2). By framing the issue in this way, petitioners have tacitly retreated from their previous claim that the government prosecuted the conspiracy charges even though it knew they could not be sustained. Obviously, if the government hoped to obtain a conviction—and presumably to defend it on appeal—it must have had a good faith belief in the viability of its legal theory and the sufficiency of its proof. Petitioners apparently maintain, however, that retrial should be barred simply because the joinder of offenses was dependent upon the conspiracy count and because the government's good faith belief in the soundness of its case on that count proved to be unfounded. They assert, in other words, that mere prosecutorial error should bar retrial after a successful defense motion for a mistrial. Petitioners' argument is contrary to this Court's decisions, which make it clear that prosecutorial error does not suffice to bar retrial under these circumstances. *E.g., United States* v. *Dinitz, supra*, 424 U.S. at 608; *United States* v.

---

standard." 633 F. 2d at 1201. Thus, the *Baker* court did not refuse to extend deference to the trial court's findings on factual questions relevant to the double jeopardy claim, and the panel below did not bow to the district court's decision on any matters of law.

Jorn, 400 U.S. 470, 484 (1971). Accordingly, further review by this Court is unwarranted.[2]

---

[2]There is no need for this Court to hold the present case pending the decision in *Oregon* v. *Kennedy*, cert. granted, No. 80-1991 (Oct. 13, 1981), where the Oregon Court of Appeals held that the Double Jeopardy Clause barred retrial after a mistrial was declared at the defendant's request. The mistrial was declared in that case because the prosecutor asked an improper question that the court regarded as "intentional, at least in the sense that it appears it was made deliberately and after some thought" and "was certain to interfere with the trial process." *State* v. *Kennedy*, 49 Or. App. 415, 619 P.2d 948, 950 (1980). In the present case, by contrast, both the district court and the court of appeals found no intentional misconduct or even gross negligence on the part of the prosecution (Pet. App. A-7 to A-9; Nov. 25, 1980 Tr. 29). Thus, an affirmance by this Court in *Oregon* v. *Kennedy*, *supra*, would not necessarily bar retrial here.

Moreover, the double jeopardy standard applied by the Fifth Circuit—barring retrial if a successful defense mistrial motion is provoked by the prosecution's "gross negligence" (Pet. App. A-7; *United States* v. *Kessler*, 530 F. 2d 1246, 1256 (5th Cir. 1976))—is the most favorable to defendants of any employed in the federal system. Compare *United States* v. *Leppo*, 641 F. 2d 149, 152 (3d Cir. 1981) (requiring prosecutorial misconduct intended to provoke a defense mistrial request); *United States* v. *Roberts*, 640 F. 2d 225, 228 (9th Cir. 1981) (same); *United States* v. *Rios*, 637 F. 2d 728, 729-730 (10th Cir. 1980) (same); *United States* v. *Green*, 636 F. 2d 925 (4th Cir. 1980), cert. denied, No. 80-6039 (Apr. 20, 1981) (same); *Mitchell* v. *Smith*, 633 F. 2d 1009, 1013 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981) (requiring intentional provocation of mistrial by prosecution or prosecutorial overreaching "so intentional, so unfair, and so prejudicial" that barring retrial is warranted). Therefore, unless this Court were to interpret the double jeopardy bar more broadly than any of the circuits has to date, retrial would not be precluded in the present case. And in the unlikely event that the result in *Oregon* v. *Kennedy* does provide support for the double jeopardy claim of petitioners in this case, petitioners will still be able to raise that argument if they are convicted after retrial. There is, therefore, no reason to hold the present case until *Oregon* v. *Kennedy* is decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

DOJ-1981-11